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Supreme Court of the United States

OCTOBER TERM, 1957

No. 702 Misc.

MORRIS H. SWITZER,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR REHEARING

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To the Chief Justice of the United States and the Associate Justices of the United States Supreme Court:

Petitioner hereby respectfully petitions for rehearing this Court's decision of June 16, 1958, which denied his petition for writ of certiorari to the United States Court of Appeals for the Second Circuit which affirmed his conviction for violations of Section 152, first subdivision, Title 18, U. S. Code and Sections 371 and the sixth subdivision of Section 152, Title 18, U. S. Code upon two counts of the indictment and which affirmed an order denying his motion in arrest of judgment and for a new trial on the ground of newly discovered evidence.

(A) Statement of Grounds of Jurisdiction on Rehearing

1. The petition for the writ of certiorari was filed herein on April 25, 1958.

2. This Court denied the petition for the writ of certiorari on the 16th day of June, 1958.

3. The jurisdiction of this Court is invoked pursuant to Rule 58, subdivision 2 of the Rules of this Court.

(B) Questions Presented for Review on Rehearing

1. Whether an instruction by the Trial Court to the jury that the defendant "has a very great interest in the outcome of the trial" followed by an instruction that "that interest may cause him even unconsciously to color his testimony so as to serve his own interest" and that "it may cause him to recall more clearly those circumstances and events which promote his interest, rather than those which do not" was tantamount to an instruction that petitioner did not testify truthfully so as to strip petitioner of the competency of his own testimony contrary to the provisions of law and thus erroneously deprive petitioner of a fair and impartial trial.

2. Whether a totally one-sided review of the evidence by the Trial Court in its charge to the jury in which it completely ignored defense testimony and contentions which was tantamount to a Government summation rather than a charge to the jury and a serious distortion of the evidence by the Trial Court in its charge to the jury and the adoption of the role of a witness by the Trial Court by adding to the testimony in its charge to the jury, erroneously deprived petitioner of a fair and impartial trial.

(C) Statutes and Rules Involved

Section 3481, Title 18, U. S. Code. *Competency of accused.*

> "In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him."

Rule 52 (b), Federal Rules of Criminal Procedure, Title 18, U. S. Code. *Harmless Error and Plain Error.*

> "(b) *Plain Error.* Plain error or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

(D) Statement of Case on Rehearing

Unfortunately this Court has seen fit to deny the petition for the writ of certiorari filed by petitioner although so many errors were committed below from which it was apparent that the petitioner was deprived of that degree of fairness and impartiality which is an American tradition and which has always been championed by this Honorable Court in the true administration of justice.

Before the petitioner was able to submit a reply to the brief interposed by the Government, which was in preparation, in which it would have been shown to this Court that the citations advanced by the Solicitor General were not controlling in this case, this Court rendered its decision. Since the rules of this Court restrict a petition for rehearing to substantial grounds available to petitioner although not previously presented, this petition for re-

hearing will be confined to such other new substantial questions. Petitioner respectfully requests this Court on this petition to reconsider its previous decision not only in the interest of justice to this petitioner but also because of its importance in the administration of criminal law.

In its charge to the jury, the Trial Court impressively stressed the interest of the petitioner in the outcome of the trial by stating

> "However, I shall point out to you that Switzer, the defendant who is on trial here, obviously has a very great interest in the outcome of the trial. That is perfectly obvious to you" (Res. App. 293a).

Subsequently, the Trial Court in its charge to the jury made a general remark and observation, the import of which was equivalent to a statement that the petitioner did not testify truthfully at the trial. The Trial Court stated to the jury,

> "However, when a witness has an interest in the outcome of any case, that interest may cause him even unconsciously to color his testimony so as to serve his own interest. It may cause him to recall more clearly those circumstances and events which promote his interest, rather than those which do not" (Res. App. 294a).

It must be borne in mind that a lay jury is not conversant with principles of law and in fact is bound to accept the law as laid down by the Trial Court. The jury hangs on its words. Here, the Trial Court instructed the jury as a matter of law that a witness who has an interest in the outcome of the trial, (and it charged the jury as a matter of law that this petitioner had a great interest in the outcome of the trial), may even unconsciously color his testimony is in effect an instruction that such an

interested witness is unworthy of belief. Such an instruction strips the testimony of a defendant of its competency contrary to the provisions of law promulgated by Congress. Congress, in its wisdom, has seen fit to make the testimony of an accused person competent whereas such instructions to the jury practically directs them to disregard the defendant's testimony since it may be colored unconsciously. This subject will be treated in REASONS RELIED ON under Question 1.

It will be recalled that petitioner, an attorney at law, was charged in the third count of the indictment, in substance, with a conspiracy to transfer the property of a corporation in contemplation of bankruptcy and with the intent to defeat the bankruptcy law (Res. App. 2a-4a). At the trial, the Government offered proof in substantiation of that charge that the property of the corporation was bought in by a nominee of the defendants at a City Marshal's sale upon judgments entered upon confessions executed and delivered by the corporation to a creditor. In further substantiation of that charge, the Government offered proof that quantities of merchandise were removed from the bankrupt's premises and sold privately with the proceeds thereof being used in partial liquidation of the indebtedness to another creditor.

In connection with the removal of quantities of merchandise from the bankrupt's premises and its subsequent disposal, the petitioner contended and so testified that the merchandise so removed and so disposed of was removed and disposed of lawfully under pledges contained in trust receipt transactions between the bankrupt and that creditor. The defense not only gave oral testimony on that point (R. 942-945) but also put into evidence one of the executed trust receipts (R. 319-20, Defendant's Exhibit C). Furthermore two Government witnesses admitted on cross-examination that there were trust receipt transactions between Berkeley Jewelers, Inc., the bankrupt, and

Bucknell Trading Corp., the creditor, in which merchandise of Berkeley Jewelers, Inc. was pledged to Bucknell Trading Corp. and upon default of the obligation, Bucknell Trading Corp. was entitled to possession and disposal of the pledged merchandise in liquidation of the indebtedness.

Despite that testimony and the exhibit, the Trial Court in its charge to the jury failed completely to even mention that matter of defense. *In fact, the Trial Court did not even mention the words "trust receipt" in its charge to the jury.* By merely summarizing the evidence offered by the Government without giving any mention whatsoever to the defense testimony or contentions not only rendered that charge one-sided but in effect made it tantamount to a Government summation against the defendant rather than a charge to the jury. The only commentary on the evidence under the third count made by the Trial Court in its charge to the jury reads as follows:

> "The Court: (Continuing) It is not disputed, for instance, that on December 15, Faskow, president of Berkeley Jewelers, Inc., signed four confessions of judgment in four named actions where the claim (1404) in each action was $1,000. He executed those confessions of judgment. They were in the name of Fellerman. That was based on the arrangement between Mintz and Fellerman. It was money that Mintz and Fellerman had jointly advanced to him in the sum of $4,000. It is not disputed that those executions of judgment were filed in the Municipal Court. The judgments were issued and pursuant to the execution the Marshal made a levy, and, ultimately, the Marshal made a sale.
>
> It is not disputed that at that sale a large amount of merchandise was purchased by money supplied by Mintz, $1,300. Everybody has testified, as I recall it that the merchandise that was taken for that $1,300 was worth a great deal more.

It is not disputed that large amounts of this merchandise were removed from the premises on 29th Street, some time at night. They were moved to private homes on Long Island and to various warehouses, and that some of the merchandise was sold at private sales, that is, at Lipson's home. Furthermore, it is not disputed that along in (1405) January a certificate of incorporation was filed for a new corporation to be known as the Berkeley-Pennsylvania Corporation, and that the purpose and arrangement was that the Berkeley-Pennsylvania Corporation would take over the so-called lay-away plan that Mr. Faskow had been operating.

Now, Fasko, Shulman and Shear have given their versions as to the circumstances under which these various things were done, and Switzer has given his.

Faskow has told us that in December bankruptcy was imminent and that he talked about it to Switzer. Switzer says he didn't know that there was danger of bankruptcy, that up until the collapse of what he called the Shapiro negotiations for new money he thought everything was going to be all right and that the corporation could survive and pay its debts. He says he was amazed and shocked and when he found out that Faskow had so many outstanding obligations as he told him about and that there was no intention at any time to take away any property that might belong to the trustee, there was no contemplation of bankruptcy, and that, in any event, whatever he did he didn't do in conspiracy with anybody else" (Res. App. 301a-302a).

In that commentary the Trial Court referred to the removal of the merchandise from the bankrupt's premises and its subsequent disposal by saying

"It is not disputed that large amounts of this merchandise were removed from the premises on 29th

> Street, some time at night. They were moved to private homes on Long Island and to various warehouses, and that some of the merchandise was sold at private sales, that is, at Lipson's home."

Yet nothing is stated there concerning the defense testimony of the removal and disposal of that merchandise under the pledges of the trust receipt transactions. This matter will be discussed under REASONS RELIED ON under Question 2.

The next item under this point is that the Trial Court distorted a portion of the testimony under that third count. After the Trial Court said "It is not disputed that at that sale a large amount of merchandise was purchased by money supplied by Mintz", the Trial Court subsequently said that "*It is not disputed* that large amounts of *this* merchandise were removed from the premises", "were removed to private homes on Long Island", "and that some of the merchandise was sold at private sales, that is, at Lipson's home." An analysis of that commentary indicates that the Trial Court held that the merchandise referred to was part of the merchandise sold at the Marshal's sale and that such an alleged fact was undisputed. That alleged fact was violently disputed by petitioner at the trial. The defendant testified that the trust receipt merchandise was removed from the premises not only before the Marshal's sale but even before the Marshal made the levy. In fact, such testimony was even given in response to a question propounded by the Trial Court itself, as follows:

> "The Court: It was taken out before the Marshal made his levy?
>
> The Witness: It was taken out before the Marshal made his levy" (R. 945).

By instructing the jury that such alleged fact was undisputed whereas it was in fact disputed was a distortion of the testimony actually given. This matter of distortion of the evidence will also be discussed under REASONS RELIED ON under Question 2.

The second count charged the petitioner, in substance, with the crime of concealing assets of the bankrupt from the Trustee. That count concerned the cheap jewelry items of rather inconsequential value that were removed from the safe after the attorney for the Trustee had given permission to the petitioner to enter upon the premises formerly occupied by the bankrupt. One of the witnesses to that alleged crime was a Mr. Johansen, the elevator operator of the premises. The Trial Court, in discussing his testimony in its charge to the jury, said,

> "Then it was the testimony of Carl Johansen, the elevator operator, that he saw Switzer come in and go to the safe and saw him take something out and put it under his coat and leave the building" (Res. App. 299a).

The record does not disclose that Mr. Johansen had testified that he saw the defendant put whatever he had taken from the safe under his coat. The record discloses that the only testimony given by anyone concerning the defendant putting the removed merchandise under his coat was given by Mr. Frier, the Attorney for the Trustee, who was not an eye-witness to the incident. He was merely a hearsay witness on that point and he only testified that in a telephone conversation with the defendant he told the defendant that he, Mr. Frier, was informed that the defendant had put under his coat what had been removed from the safe (R. 780).

In its decision on the motion in arrest of judgment and for a new trial upon the ground of newly discovered evi-

dence, the Trial Court conceded that the Court was in error in attributing that testimony to the eye-witness, Mr. Johansen. The Trial Court said in that decision,

> "the Court in its charge, incorrectly attributed that testimony to Johansen rather than to Frier" (Pet. App. 75).

There can be no denial that a statement of an alleged fact by the Trial Court in its charge could carry great weight with a jury particularly after a lengthy trial at which much testimony was adduced. Nor can there be a denial that attributing that testimony to an eye-witness rather than a hearsay witness would carry greater weight against a defendant. The Trial Court recognized the importance of whether or not Mr. Johansen had testified to that alleged fact for it stated in its decision,

> "This contention is crucial to Switzer's present claim" (Pet. App. 75).

The Trial Court thought it of sufficient importance to hold a hearing at which the Court Reporter was called as a witness and testified as to whether or not Mr. Johansen had so testified (Pet. App. 75). The Trial Court then concluded,

> "I find that the reporter correctly recorded and transcribed Johansen's testimony. My trial notes agree with the transcript" (Pet. App. 75).

The fact that the Trial Court's notes confirms that Mr. Johansen did not so testify causes the error of the Trial Court to be more grievous. Had the Trial Court consulted its trial notes in the preparation of the charge, that misstatement of fact could have been avoided. In any event, the fact that the Trial Court attributed that testimony to Mr. Johansen would have the same effect upon the jury as though Mr. Johansen had so testified. Thus, here we have an instance where the Trial Court added to the testi-

mony and conceded that it had done so on a matter that was "crucial to" the defendant's claim on the motion in arrest of judgment and for a new trial. The importance of such testimony is that it conveyed the impression that the defendant acted surreptitiously while removing the safe merchandise from the premises whereas the 21a testimony of Mr. Johansen revealed that the defendant acted openly.

That matter of adding to the testimony will likewise be discussed under REASONS RELIED ON under Question 2.

(E) Reasons Relied On

As to Question 1:

Congress had seen fit to permit a defendant accused of an offense against the United States to testify in his own behalf and be a competent witness by the enactment of a statute which is presently designated as Section 3481, Title 18, U. S. Code. That provision of law would be rendered useless in any case in which the Trial Court arbitrarily instructs a jury either directly or inferentially that the testimony of the accused is not worthy of belief. Should the Trial Court make some comment in its charge which can be considered to mean that the testimony of an accused is untruthful merely because he is the accused, that in effect would be tantamount to an instruction that the jury is to disregard or not give any weight to the defendant's testimony. In the case at bar, after the Trial Court instructed the jury that the defendant had a very great interest in the outcome of the case, it then made a general observation that the interest of a defendant in a criminal case would cause him unconsciously to color his testimony and make him recall only those circumstances and events which promote his interest rather than those which do not.

What can that mean to a lay jury which is bound to accept the instructions of the Trial Court as binding and which would be inclined to treat the observation of a Trial Judge with the deepest respect? It can only mean that defendants in criminal cases cannot be expected to tell the truth and therefore the jury should not believe the petitioner in the instant case. That even if the defendant intended to testify truthfully, his testimony would still be unworthy of belief for he may unwittingly testify falsely. Such an instruction strips the competency of an accused's testimony and negates the provisions of law enacted by Congress. If the testimony of the accused is not to be believed, it can have no competency to the case. If the testimony of the accused is not to be believed, why permit him to testify at all? Under such circumstances, giving an accused the right to be a witness in his own behalf would be a farce and meaningless.

In *Hicks* v. *United States*, 150 U. S. 442, 14 S. Ct. 144, this Court was confronted with a similar situation. In the *Hicks* case, the Trial Court instructed the jury that the defendant had an interest in the case and then made a general observation that anyone in the defendant's position might be led away from the truth because of that interest. This Court, in reversing the judgment of conviction in the *Hicks* case said at page 450,

> "Another assignment seems to us to present a substantial error. This has to do with the instructions by the learned judge to the jury on the weight which they should give to the testimony of the accused in his own behalf."

The Court went on further at page 451,

> "The learned judge further, in his instructions, argued to the jury that in considering the personal testimony of the accused they should consider this interest in

this case.' 'You are to consider his consequent motive growing out of that interest in passing upon the truthfulness or falsity of his statement. He is in an attitude, of course, where any of us, if so situated, would have a large interest in the result of the case; the largest, perhaps, we could have under any circumstances in life; and such an interest, consequently, as might cause us to make statements to influence a jury passing upon our case that would not be governed by the truth. We might be led away from the truth because of our desire. Therefore, it is but right, and it is but your duty, to review the statements of such a witness in the light of his attitude and in the light of the other evidence.'

It is not easy to say what effect this instruction had upon the jury. * * * It is not unusual to warn juries that they should be careful in giving effect to the testimony of accomplices; and perhaps a judge cannot be considered as going out of his province in giving similar caution as to the testimony of the accused person. Still it must be remembered that men may testify truthfully, although their lives hang in the balance, and that the law, in its wisdom, has provided that the accused shall have the right to testify in his own behalf. Such a privilege would be a vain one if the judge, to whose lightest word the jury, properly enough, give a great weight, should intimate that the dreadful condition in which the accused finds himself should deprive his testimony of probability. The wise and humane provision of the law is that 'the person charged shall, at his own request, but not otherwise, be a competent witness.' The policy of this enactment should not be defeated by hostile comments of the trial judge, whose duty it is to give reasonable effect and force to the law."

In *Allison* v. *United States*, 160 U. S. 203, 16 S. Ct. 252, this Court reaffirmed the principle laid down in the *Hicks* case. In the *Allison* case, the Trial Court instructed the jury that it is to look at the statements of the defendant in the light of the interest he has in the result of the case. This Court in the *Allison* case reversed the judgment of conviction and said at page 207,

> "And it was for the jury to test the credibility of the defendant as a witness, giving his testimony such weight, under all the circumstances, as they thought it entitled to, as in the instance of other witnesses, uninfluenced by instructions which might operate to strip him of the competency accorded by law.
>
> We repeat what was said by Mr. Justice Shiras, speaking for the court, in Hicks v. U. S., 150 U. S. 442, 452, 14 Sup. Ct. 144: (Citing the last paragraph of the preceding citation, except for the first sentence.).

In *Quercia* v. *United States*, 289 U. S. 466, 53 S. Ct. 698, the Trial Court made a comment to the jury that the defendant wiped his hand during the giving of his testimony and that such a mannerism indicated to the Trial Court that a person exhibiting such a mannerism was not telling the truth. The Trial Court, however, instructed the jury that its opinion of the evidence was not binding on the jury and that if the jury did not agree with the Trial Court, it should find the defendant not guilty. In reversing the judgment of conviction, this Court said at page 472,

> "* * * but in a sweeping denunciation repudiated as a lie all that the accused had said in his own behalf which conflicted with the statements of the government's witnesses. This was error and we cannot doubt that it was highly prejudicial.

> Nor do we think that the error was cured by the statement of the trial judge that his opinion was not binding on the jury and that if they did not agree with it they should find the defendant not guilty."

Likewise, in the case at bar. After the Trial Court, in effect, instructed the jury that a defendant, having an interest in the outcome of the trial, could not be believed, any further instructions that the jury is to pass upon the credibility of the defendant's testimony would be ineffectual and unavailing in view of the prejudice caused by the comments of the Trial Court.

The issue may be raised that Trial Counsel for petitioner made no exception to the charge. The Courts have consistently held that even though no exception was taken to the charge where there is "plain error", the Courts may take notice of such error. That principle of law is laid down in Rule 52 (b) of the Federal Rules of Criminal Procedure, Title 18, U. S. Code. In *United Brotherhood v. United States*, 330 U. S. 395, 67 S. Ct. 775, this Court ruled at page 411,

> "And though the failure to charge was not excepted to, we would not be precluded from entertaining the objection. The erroneous charge was on a vital phase of this case and affected the substantial rights of the defendants. We have the power to notice a 'plain error' though it is not assigned or specified."

See also *Brasfield v. United States*, 272 U. S. 448, 450, 47 S. Ct. 135; *Screws v. United States*, 325 U. S. 91, 107, 65 S. Ct. 1031.

As to Question 2:

It has been shown in STATEMENT OF CASE that the Trial Court in its charge to the jury, in which it gave a commentary on the evidence under the third count committed two errors. First, it failed to discuss the defense testimony to the effect that the merchandise taken from the bankrupt's premises was removed under pledges of trust receipts as well as the defense contention that the removal and disposal of that merchandise was lawfully done under the Trust Receipt Law of the State of New York. Second, the Trial Court adopted the role of a witness by instructing the jury that it was undisputed that the merchandise removed was part of the merchandise that was sold at the Marshal's sale, particularly when such testimony was disputed by the defendant. The conclusion reached by the Trial Court was at least a distortion of the evidence. Third, it has further been pointed out that in its discussion of the testimony under the second count, the Trial Court added to the testimony by attributing to an eyewitness, testimony given by a hearsay witness thus giving the impression to the jury that petitioner acted surreptitiously. That testimony concerned the matter of putting "under his coat" what the defendant had removed from the safe.

In its opinion, the Court of Appeals failed to touch upon these points raised under this question. The negative action of the Court of Appeals is contradictory to the decisions of this very Court. In *Starr* v. *United States*, 153 U. S. 614, 14 S. Ct. 919, this Court said at page 626,

> "* * * The evidence, if stated at all, should be stated accurately, as well that what makes in favor of a party as that which makes against him; deductions and theories not warranted by the evidence should be

studiously avoided. They can hardly fail to mislead the jury and work injustice. Burke v. Maxwell, 81 Penn St. 139, 153. See also 2 Thompson on Trials, Secs. 2293, 2294, and cases cited.

It is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest word or intimation is received with deference, and may prove controlling. Hicks v. United States, 150 U. S. 442, 452."

In *Quercia* v. *United States*, 289 U. S. 466, 53 S. Ct. 698, supra, this Court, in reversing a judgment of conviction, stated at page 470,

"This privilege of the judge to comment on the facts has its inherent limitations. His discretion is not arbitrary and uncontrolled, but judicial, to be exercised in conformity with the standards governing the judicial office. In commenting upon the testimony he may not assume the role of a witness. He may analyze and dissect the evidence, but he may not either distort it or add to it. * * * This Court has accordingly emphasized the duty of the trial judge to use great care that an expression of opinion upon the evidence 'should be so given as not to mislead and especially that it should not be one-sided.'"

Conclusion

It is respectfully submitted that the various new questions raised in this petition for rehearing are of such importance in the administration of the criminal law that there should be an authoritative determination of the same by this Honorable Court and that the interests of justice would best be served by a review of this case. Accordingly, the petitioner respectfully requests that this Court

grant this petition for rehearing and upon such rehearing issue a writ to review the judgment of affirmance herein.

Respectfully submitted,

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Attorneys for Petitioner

Certificate

We hereby certify that this petition is presented in good faith and not for the purpose of delay. We hereby further certify that this petition is restricted to other substantial grounds available to petitioner although not previously presented to this Court in the petition for the writ of certiorari.

Dated, July 10, 1958.

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